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DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 28-960162
Controlled Substance Excise Tax
For The Period: 1995

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Controlled Substance Excise Tax—Liability

Authority: IC 6-7-3-5

The taxpayer protests the assessment of controlled substance excise tax.

STATEMENT OF FACTS

On two separate occasions in 1992 a "confidential informant" for a drug task force purchased marijuana from the taxpayer. The taxpayer was subsequently arrested for dealing marijuana, and in 1993 pled guilty to dealing marijuana. The Department of Revenue assessed the taxpayer for Controlled Substance Excise Tax ("CSET") in August of 1995. The taxpayer was assessed the CSET for 17.1 grams of marijuana.

I. Controlled Substance Excise Tax—Liability

DISCUSSION

In Indiana, the manufacture, possession or delivery of marijuana is taxable. IC 6-7-3-5 (hereinafter referred to as "CSET"). Indiana law specifically provides that notice of a proposed assessment is *prima facie* evidence that the Department's claim for the unpaid tax is valid. The taxpayer then bears the burden of proving that the proposed assessment is wrong.

There are two means of avoiding the CSET assessment. The taxpayer can meet its burden and prove that it did not manufacture, possess, or deliver marijuana as required under IC 6-7-3-5. The second means of avoiding CSET is if the Department of Revenue is not the first jeopardy to attach. There is a wealth of case law on this point (*See* Bryant v. Indiana Dept. of State Revenue, 660 N.E.2d 290 (Ind. 1995); Clifft v. Indiana Dept. of Revenue, 660 N.E.2d 310 (Ind. 1995)), and it is not necessary to recapitulate the cases. The Indiana Supreme Court has held that the CSET assessment is considered a jeopardy under Constitutional analysis when the assessment is served on the taxpayer. Conversely, the criminal jeopardy attaches when either a jury has been impaneled and sworn, or when a plea agreement has been entered into and approved by the judge. Under "double jeopardy" analysis, the first jeopardy to attach precludes the second one from attaching—though the courts may be changing their position on this when it comes to civil and criminal matters (*See* Hudson v. United States, 118 S. Ct. 488 (1997)(holding that the double jeopardy clause protects only against the imposition of multiple criminal punishments for the same offense and then only when such occurs in successive proceedings).

The Department telephoned the taxpayer's representative to schedule a hearing. The taxpayer's representative at that time stated that neither he nor the taxpayer would attend the hearing. The taxpayer gave no grounds for why a hearing would not be attended. The Department scheduled a hearing for Thursday, March 11, 1999, at 10 a.m. Neither the taxpayer nor the taxpayer's representative arrived for the hearing. Subsequent to the hearing, the taxpayer's representative faxed to the Department documentation to be added to the file. The documentation, which is dispositive for issue at hand, was sentencing information that showed that the taxpayer's criminal jeopardy attached before the Department's jeopardy assessment. The former attached in 1993, the latter in 1995. Thus under "double jeopardy" analysis, the taxpayer does not owe the tax.

FINDING

The taxpayer's protest is sustained.